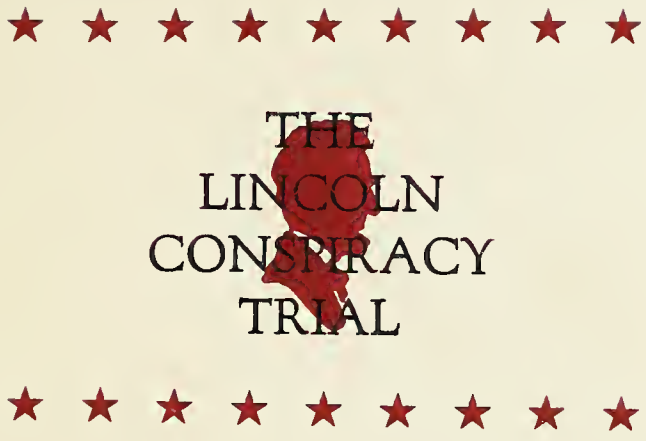

THE LINCOLN CONSPIRACY TRIAL

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John W. Curran

WHEN you consider that the Lincoln conspiracy trial continued for practically two months, from May 13, 1865, to July 7, 1865, to be exact, and that three hundred and sixty-one witnesses were examined, you no doubt realize that it would take a book to properly present its story. Hence it would be presumptuous to assume that this paper even scratches the surface of the most famous military trial in American history.

That eight persons, most of them of ordinary mien, were the only ones found guilty of being conspirators in the assassination of President Lincoln is a fact that tends to arrest the minds of even the credulous. Though the finger of suspicion has been pointed at others, certain aspects of the great conspiracy remain today as much of a mystery as they ever did. Furthermore, unless the literature of that period is examined and appraised, the mystery will never be solved, as there is extant some good material, some bad material, and some indifferent material. Take, for example, the note on p. 762 of Marshall's *American Bastile* and consider it in reference to modern stories about John Wilkes Booth's death and burial, and in turn the Booth mummy. The note reads:

In 1867 Edwin Booth, the actor, sent Mr. Weaver, the sexton of Christ's Church, Baltimore, to Washington, with a request that the remains of his brother might be taken up and removed to the family burial place. After some delay the request was granted by President Johnson, who was finally appealed to, and Mr. Weaver took the body to the cemetery in Baltimore and buried it beside the elder Booth and others of the family. The removal was conducted with great secrecy, and was concealed from Secretary Stanton, who had refused to give his consent.

Poore, in his well-known work relating to the Lincoln conspiracy trial, states in his introduction, "The assassination of Abraham Lincoln was a military crime." As a result of the assassination, eight of the accomplices of John Wilkes Booth were subjected to a military trial without a jury in May, 1865. The accused claimed that the military commission had no jurisdiction over them as they were civilians and under the constitutional guaranties were entitled to a jury trial in the criminal court, just as others, accused of crime, were then getting in the District of Columbia criminal court. In June, 1867, two years after the eight conspirators were tried, the ninth alleged conspirator, John H. Surratt, was tried by a jury in the criminal court of the District of Columbia, although at first there was an inclination to have a trial by a military commission for him, similar to the trial of the previous eight in 1865. Thus, you see, there were two trials that evolved out of the assassination of President Lincoln by Booth—one, a military trial without a jury for the eight in 1865, and the other a regular criminal trial with a jury, for the ninth in 1867.

Almost a necessary background for the 1865 trial, strange as it may seem, is the 1867 trial, as in the latter trial one finds many things mentioned about the 1865 trial that are not found in any of the four principal publications about the earlier trial.

For example, the fact that Booth had a diary is not mentioned in the official publication of the 1865 trial, but it is referred to in the trial of John H. Surratt in 1867. It was two years before the public became aware of the fact that Booth had a diary. Another important item that is not found in the official publication of the 1865 trial is the petition for leniency that a majority of the military commission, which tried Mary Surratt with the others, had signed on her behalf. This petition to President Johnson recommended a commutation of her sentence from one of death to life imprisonment. It also took two years for this to appear before the public eye, and when it fomented public indignation, President Johnson said he never saw the petition of leniency which was alleged to have been attached to the record of the conspiracy trial presented to him by Judge Advocate Holt. In the ensuing discussion, the above matters will be considered in detail, along with the specific question of whether the military commission had in law any jurisdiction over the civilian conspirators.

It is a fact that in most criminal trials there are many matters suppressed for one reason or another, and the failure of the state to use all its evidence is no more a sign of innocence than the failure of the defense to use all its evidence is an indication of guilt. Often guilt drips from a defendant on just one piece of evidence, and what is added or subtracted is immaterial. Everyone does not weigh evidence in the same manner, as was indicated when a jury failed to find John H. Surratt guilty in 1867 on almost the same evidence that the military commission without a jury found his mother, Mary Surratt, and seven others guilty in 1865.

Now let us consider the conspiracy trial in detail. The Lincoln conspiracy trial was the trial of the eight conspirators leagued with John Wilkes Booth in the assassination of Presi-

dent Lincoln. Immediately after the president's death, Secretary of War Stanton announced in an official bulletin that all persons who had harbored or secreted Booth and his aids or assisted their escape should be subjected to a trial before a military commission. Booth was captured on April 24, 1865, in Garrett's barn near Port Royal, Virginia, and is said to have died on Garrett's porch shortly thereafter. Arrested as his coconspirators were David E. Herold, George A. Atzerodt, Lewis Payne, Michael O'Laughlin, Edward Spangler, Samuel Arnold, Mrs. Mary E. Surratt, and Dr. Samuel A. Mudd. They were brought to trial on May 10, 1865, before a military commission of nine officers convoked by order of President Andrew Johnson, following an opinion of Attorney-General Speed that a military trial was constitutional. This proceeding was based upon the theory that the assassination of Lincoln was a military crime. Instead of a secret military trial, the defendants demanded as civilians a public trial by jury in the District of Columbia civil courts, which were then open and functioning, but the military commission sustained its own jurisdiction and proceeded with the trial. The trial continued for several weeks, and on July 5, 1865, President Johnson approved the commission's findings, ordering four of the defendants to be imprisoned and four to be executed. On July 7, 1865, the date set for the hanging, Mary E. Surratt applied to Judge Wylie of the supreme court of the District of Columbia for a writ of habeas corpus. The writ was issued by Judge Wylie and made returnable before the supreme court of the District of Columbia at ten o'clock that morning. Instead of obeying the writ and producing the person of Mary E. Surratt at ten o'clock, Major General Hancock, accompanied by Attorney-General Speed, appeared before Judge Wylie at eleven-thirty o'clock that morning without Mary E. Surratt, because President Johnson had

suspended the writ. Judge Wylie, though he should not have done so under the circumstances, yielded to the suspension of the writ, and Mary E. Surratt, David E. Herold, George A. Atzerodt, and Lewis Payne were hanged that afternoon. The other four were sent to the federal prison (Dry Tortugas) in Florida. In 1867 O'Laughlin died during an epidemic of yellow fever which swept the prison; and in 1869 Dr. Mudd, Samuel Arnold, and Edward Spangler were pardoned by President Johnson.

Any discussion of the Lincoln conspiracy trial would be incomplete without a reference to the fact that the small diary removed from Booth's pocket at his capture was not included with the other Booth effects introduced at the trial of the co-conspirators. A reference also should be made to the controversy between President Johnson and Judge Advocate General Holt over the recommendation of mercy in behalf of Mrs. Surratt signed by a majority (five) of the commission which had sentenced her to be executed. These matters will be considered in detail shortly. It has always been a difficult problem to determine when, if at all, a civilian is subject to military trial.

An interesting side light on this question of jurisdiction is to be found in the diary of Gideon Wells. In the diary of Wells is an observation that seems to indicate that at first blush Attorney-General Speed was of the opinion that, as the Lincoln conspirators were civilians, they should be tried in the criminal court of the District of Columbia and not by a military commission. Wells, in his diary, states: "I regret they are not tried by the civil court, and so expressed myself, as did McCullough [McCullough was Secretary of the Treasury]; but Stanton, who says the proof is clear and positive, was emphatic, and Speed advised a military commission, though at first, I thought, otherwise inclined." Orville Hickman Browning, in his diary, states:

"This commission was without authority, and its proceedings void. . . ."

Often the question is asked, if the military commission had no jurisdiction of the defendants, why didn't the prisoners apply for a writ of habeas corpus? The answer is that as a practical matter the operation of the writ was impeded by the view taken by many of the judges that the President had the power either to suspend it or to ignore it, and furthermore, the prisoners could be moved out of the jurisdiction of a judge who took a contrary view of the law, viz, that followed the view of Mr. Chief Justice Taney. A moment ago it was stated that Mary E. Surratt, one of the defendants, sought her release by means of a habeas corpus proceeding on the day set for her execution, but without avail, as President Johnson suspended the operation of the writ that morning.

Should Judge Wylie have yielded to the order of the President? In my opinion, he should not have recognized the executive order and should have commanded General Hancock to obey the order of the court just as the judge did in the famous Wolfe Tone case. Wolfe Tone had been sentenced to death by an order of a military court, and on the morning set for his execution his counsel sought a writ of habeas corpus, stating "I do not pretend that Mr. Tone is not guilty of the charge of which he is accused. I presume the officers were honorable men. But it is stated in this affidavit as a solemn fact, that Mr. Tone had no commission under his Majesty, and, therefore, no court-martial could have cognizance of any crime imputed to him while the Court of King's Bench sat in the capacity of the great Criminal Court of the land. In times when war was raging, when man was opposed to man in the field, courts-martial might be endured; but every law authority is with me, while I stand upon the sacred and immutable principle of the

Constitution, that martial law and civil law are incompatible, and that the former must cease with the existence of the latter. This is not, however, the time for arguing this momentous question. My client must appear in this court. He is cast for death this very day. He may be ordered for execution while I address you. I call on the court to support the law, and move for a writ of Habeas Corpus, to be directed to the Provost Marshal of the barracks and Major Sandys, to bring up the body of Tone." The chief justice thereupon said: "Have a writ instantly prepared and Mr. Sheriff proceed to the barracks and acquaint the Provost Marshal that a writ is preparing to suspend Mr. Tone's execution, and see that he be not executed." The military officers refused to obey the writ, and the chief justice said: "Mr. Sheriff, take the body of Tone into custody. Take the Provost Marshal and Major Sandys into custody, and show the order of the court to General Craig."

If Judge Wylie in the District of Columbia Supreme Court had refused to bow to the executive order suspending the writ of habeas corpus in the petition of Mary Surratt as the judge did in Wolfe Tone's case, there would have been a good chance to appeal the matter to the Supreme Court of the United States and prevent the hanging of Mary Surratt on July 7, 1865. That it was possible to appeal to the Supreme Court of the United States was indicated in the famous Milligan case which was pending at that time. Milligan, an Indiana lawyer, was found guilty of military treason by a military commission in Indianapolis, and sentenced to be hanged. His execution was postponed pending an appeal to the Supreme Court of the United States, and lo! and behold, the Supreme Court ordered the military authorities to set Milligan free. And he was set free, and turned the tables by suing the military officers who arrested him! Many feel that, if Mary Surratt had not been executed a

few months before the Supreme Court decided the Milligan case, she would have been in the same category as Milligan, as they were both civilians who had been tried and sentenced to death by a military commission without a jury trial.

When you decide the question of the jurisdiction of the military commission, the innocence or guilt of the defendant is not involved. Some say that, as Washington was in the theater of war and Indiana was not, the military commission had jurisdiction over civilians in Washington but not in Indiana. This view ignores the common-law rule that the military has no jurisdiction if the civil courts are open, and also the fact that the Indiana and Washington courts were open. Hence, today's view is that the majority of the court were correct in ordering Milligan to be set free. Still, there are those who feel that the Milligan decision is limited by the fact that the majority of the court claimed to have "judicial knowledge that in Indiana, in time of war, the federal authority was always unopposed, and its courts always open to hear criminal accusations, and redress grievances." It is further contended that the fact assumed by the majority of the court was really a political question not for the court to decide.

The execution of Mary Surratt was previously mentioned as well as the fact that a recommendation of mercy in her behalf was sent to President Johnson signed by five of the nine members of the military commission who tried her and found her guilty. President Johnson was alleged to have said "Treason must be made odious" and in reference to Mary Surratt, "She kept the nest that hatched the egg." Furthermore, it is recalled that President Johnson claimed that he never saw the recommendation of mercy which was supposed to have been attached to the record of the trial sent to him. The petition signed by a majority of the military commission read:

To the President: The undersigned, members of the Military Commission appointed to try the persons charged with the murder of Abraham Lincoln, etc., respectfully represent that the commission have been constrained to find Mary E. Surratt guilty, upon the testimony, of the assassination of Abraham Lincoln, late President of the United States, and to pronounce upon her, as required by law, the sentence of death; but in consideration of her age and sex, the undersigned pray for your Excellency, if it is consistent with your sense of duty, to commute her sentence to imprisonment for life in the penitentiary.

The mystery of the petition still remains unsolved. Incidentally, Secretary of the Treasury Hugh McCulloch in his memoirs, referring to President Johnson and the execution of Mary Surratt, said, "that he [President Johnson] especially regretted that he ordered the writ of habeas corpus, issued by Judge Wylie, on the morning of her execution to be disregarded."

Now let us consider the mystery of Booth's diary. Why was it that the diary of Booth which was found in his pocket in 1865 at Garrett's barn was not introduced in evidence in the trial before the military commission in 1865, along with Booth's knife, belt, cartridge box, pistols, and pocket compass? Conger, a witness in the 1865 military trial, said nothing about Booth's diary, although he mentioned the other things, but the same witness when testifying for the prosecution on June 25, 1867, in the second trial stated. " . . . He had a diary . . . an ordinary pocket diary . " and when Conger was questioned about the leaves of the diary, he said, "There were some out. They were cut out with a knife, and cut at different times, I should say. They were cut nearly straight down, but one cut was across another, so that the stubs didn't match." Conger, who had recently seen the diary again, also said the

diary was in the same condition when Booth had it. When Conger was asked to whom he had given the diary and other articles of Booth, he said "To the Secretary of War, Mr. Stanton."

Two schools of thought exist in reference to the reason why the diary was suppressed as evidence. One school takes the view that the diary had no probative value and therefore it would be useless to introduce it, as it would only inflame the public mind; the other school contends that the diary would have thrown a different light on the nature of the conspiracy. Thus, you see, it is a fact that a diary which had been taken from Booth was not used by the prosecution as evidence in 1865 and it was not used by the defense because of ignorance of its existence; and it was not until two years later, when it was sought to use the diary in the second trial, that the story of its suppression during the first trial became common knowledge. Such is the story of Booth's diary.

The mention of Booth's diary reminds one of Booth's death. As to Booth's death there are three possible schools of thought; one to the effect that Booth was shot and killed at Garrett's barn; another, that Booth escaped from Garrett's barn; and third, that Booth committed suicide in Garrett's barn. It is not the purpose of this article to consider the matter of Booth's death, but as to the possibility of Booth having committed suicide in Garrett's barn, note the following testimony given May 17, 1865, by witness Everton J. Conger: "I said he had shot himself. . . . Baker said he had not. . . . I asked where he was shot. . . . We raised him up and the blood ran out of his wound; I then said 'Yes, he has shot himself.' " Two years later, on June 25, 1867, Conger was again called as a witness for the prosecution in the trial of John H. Surratt, and he repeated practically the same story about Booth's death as he

did in 1865. Among other things, Conger said in 1867 "I supposed he shot himself."

These are merely a few of the thought-provoking matters that one notices in the Lincoln conspiracy trial and they are presented to you for further study. In concluding, might it not be said that after considering the various questions, one still goes out the door he came in, as the question of whether the military commission had jurisdiction is still unsettled; the question of whether President Johnson knew of the petition of leniency that the military commission submitted in behalf of Mary Surratt is likewise unsolved; and the significance of the suppression of Booth's diary in the 1865 trial is undetermined; and last, but not least, is the uncertainty as to the time and cause of Booth's death.